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No. 93-1279

In The

Supreme Court of the United States

October Term, 1993

THERESA REALI, et al.,

Petitioners,

vs.

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners present a misleading statement of facts and erroneous legal analysis of the opinion of the Court of Appeal for the State of California, Fifth Appellate District. For reasons described herein, certiorari should be denied in this case because:

1. The Court of Appeal based its decision enjoining petitioners from interfering with the rights of patients for access to, and medical treatment from, respondent clinic concerning

abortion, and awarding attorney fees to respondent on independent and adequate state grounds; and

2. The Court of Appeal opinion is correct, does not present special or important reasons for the grant of certiorari and is not in conflict with any opinion of this Court.

PERTINENT STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

Cal. Const., art. I, § 1 provides:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Cal. Const., art. I, § 2(a) provides:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Cal. Code of Civ. Proc. § 1021.5 provides:

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class

> of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. . . .

STATEMENT OF THE CASE

Respondent respectfully refers the Court to the factual statements presented by the trial court (Pet. at 76a to 91a) and the Court of Appeal (Pet. at 1a to 37a) in their decisions for an objective statement of the evidence justifying injunctive relief and the accompanying order for attorney fees. In addition, respondent emphasizes the following salient facts to underscore the necessity and desirability of the appellate opinion's affirmance of the trial court's order:

January 23, 1988 marked the fifteenth anniversary of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). On every Saturday since that date, until the granting of the injunction that is the basis of the opinion challenged herein, petitioners and those in concert with them intimidated and harassed the Feminist Women's Health Center (FWHC) staff and patients for the purpose of deterring women from availing themselves of abortion counseling and services at the clinic. On numerous occasions, Ms. Shauna Heckert, administrator for the four FWHC clinics in Northern California, witnessed petitioners interfere with clinic patients' visits for medical care and advice. On February 6, 1988, for instance, Ms. Heckert, while working on the second floor of the medical building, observed petitioner Theresa Reali chasing a patient and her male

companion in an attempt to thrust unwanted anti-abortion literature at them. (RT 221). Ms. Reali had followed the patient and her companion from outside the building up the stairs to the second floor offices of respondent. This resulted in Ms. Heckert requesting Ms. Reali to leave the premises of the private building and thereafter escort her out. *Id.* The patient was visibly upset and crying due to Ms. Reali's harassment. On other occasions Ms. Heckert saw petitioner Reali throw water on the entrance to the clinic. (RT 221).

Ms. Heckert also observed petitioner Murray Lewis block the entrance to the parking lot of the clinic. When cars attempting to enter the lot were forced to stop, she saw him open or attempt to open their doors or shove pamphlets through their partially open windows while shouting at the occupants, "Don't kill your babies." (RT 222). Patients subjected to these verbal attacks became visibly upset. Alison Gude, who was employed for a short time by the FWHC as clinic escort coordinator, also testified that she saw Murray Lewis and John Stoos picket in the middle of "I" Street so as to force cars approaching the parking lot of the medical building to swerve around them in order to enter the lot. (RT 308).

Similar incidents were so frequent at the medical building that Ms. Heckert was forced to organize a team of clinic "escorts". "Escorts" were volunteer men and women who, at the request of the FWHC, assisted patients and their families in passing through the crowd of anti-abortion adherents so as to shield them from harassment. (RT 226). This harassment soon became commonplace enough that it was necessary for the FWHC to hire an escort coordinator. (RT 251).

Before escorts were used to assist patients to and from the building premises, patients were first asked if they wanted such help. (RT 229). Generally when patients arrived at the FWHC they would call the clinic from across the street at a Winchell's donut shop and request assistance from an escort to enter the building. (RT 230). Once a patient asked for assistance the escort explained that if at any time during the walk to the building the patient wished to receive the literature being dispersed by petitioners, the escort would stop and allow such action. (RT 364). On one occasion, noted for its uniqueness, a patient wished to accept a piece of literature from petitioners and did so without any resistance from her escort. (RT 410).

Even with escorts, intimidation and harassment by petitioners of FWHC and its patients continued despite the court's earlier order against it. Anti-abortion crowds in the building's private parking lot and on the grounds became commonplace, and, coupled with the noise they created, seriously interfered with the rights of patients to privacy in their medical consultations and to everyone else in the building. The disruptive noise level was the product of organized chanting, voice amplified yelling and, in the case of John Walker, an appellant below who did not join in the instant petition, the blowing of a trumpet. In fact, when Walker was informed by an FWHC representative that he was trespassing on the private parking lot, he blew his trumpet in her face. (RT 354).

Petitioner Blythe was observed on at least three separate occasions disregarding the boundaries of the court ordered speech free zone while he continued to closely follow a patient and escort, all the time yelling at the

patient not to enter the medical building. (RT 310-312). Murray Lewis did the same. (RT 326). Blythe also took photographs of patients entering the building, in violation of the court order. (RT 313).

Petitioner Jay Baggett was seen demonstrating directly in front of the FWHC and physically blocking escorts to prevent them from walking with the patients. (RT 313).

Johan Otto, owner and general manager of the medical building testified that he was unable to rent out unoccupied space in the building because of the continual commotion created by anti-abortion swarm. Prospective tenants did not want to "put up with that stuff;" the "political squabbles." (RT 134). Also, due to the unauthorized demonstrating in the parking lot, Otto was forced to place additional "No Parking" signs in the private lot in order to alleviate the concerns of the tenants of the building who had voiced their displeasure over the demonstrators. (RT 137).

Petitioners' actions, including the noise they produced, disrupted the work of the FWHC doctor who performed abortions. Dr. Bruce Steir testified he needed complete concentration when performing abortions and that petitioners' conduct created such a disturbance that his concentration was impaired. (RT 151-153). He also testified that signs and placards containing the words "Dr. Steir Butchers Babies Here," displayed by petitioners while they were in front of the building, so angered and disgusted him as to impede his concentration. (RT 158). Quite obviously, the abortion procedures performed by

the doctor were jeopardized by petitioners' disruptive behavior, a not unintended result.

The intimidation and harassment by the petitioners of FWHC and its patients also resulted in a number of patients cancelling their appointments at the clinic. Ms. Heckert testified that when petitioners' activities began there was a significant drop-off in the number of women seeking the clinic's services on Saturdays, the day when petitioners and their cohorts were most out in force. (RT 1018-1019). This drop-off was directly attributed to petitioners' conduct as patients were frightened by the harassment they experienced. (RT 1018).

Petitioners' behavior continued from that third Saturday in January of 1988 through March of 1989. During that period, police were summoned by FWHC representatives several times and asked to remove the petitioners as trespassers. (RT 214, 223). In fact, on one occasion, Ms. Heckert was forced to make citizens' arrests of two abortion foes, John Walker and petitioner Murray Lewis, who refused to obey earlier police requests to leave the premises. (RT 1019). Finally, the disruptive and intimidating activities of petitioners, coupled with the police's refusal to make any more arrests without a court order, persuaded FWHC to seek a preliminary injunction to restrain petitioners' meddling behavior. This injunction was sought after FWHC representatives met with City Council members and the Mayor to see if there were any other remedies available. (RT 1022). It was determined that a preliminary injunction was the only efficacious way to protect the safety of FWHC's patients. As Ms. Heckert testified, "I wanted my patients to be able to come into

my building without being harassed and accosted." (RT 1023).

The appellate opinion stated that, "after the temporary restraining order and preliminary injunction issued," the following activities by petitioners continued at the FWHC clinic: the use of cameras to take pictures of patients, bumping into and pushing aside patient "escorts" hired by the clinic to assist patients in entering the building, following patients in restricted areas, blocking cars attempting to enter the parking lot, persisting in offering literature refused by patients, blocking passage on the sidewalk in front of the medical building, and picketing in restricted areas. (Pet. at 6a.)

Further supplementing the Statement of the Case is the answer to the petition for review filed before the California Supreme Court. That petition for review was denied. (Pet. at 107a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE CALIFORNIA COURT OF APPEAL BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS, SPECIFICALLY THE STATE CONSTITUTION'S RIGHT OF PRIVACY AND THE STATE STATUTE AUTHORIZING THE AWARD OF ATTORNEY FEES IN CASES CONFERRING A SIGNIFICANT BENEFIT UPON THE PUBLIC.

A. The California Constitution's Explicit Right of Privacy is Broader than its Federal Counterpart and is the Basis of the Appellate Opinion and Underlying Trial Court Order.

This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a

state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. See, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-636 (1875). The starting point for determining whether an "independent" and "adequate" state ground exists, of course, is the state court opinion that accompanies the judgment. *Washington v. Chrisman*, 455 U.S. 1, 5 n.2 (1982); *Uhler v. American Fedn. of Labor-Congress of Indus. Orgs.*, 468 U.S. 1310, 1311 (1984) ("The California Supreme Court ruled that the proposed initiative would violate both the Federal and State Constitutions, and a majority of this Court would probably conclude that there was an adequate and independent state ground for the state court's decision.") Beyond that, this Court may turn to other parts of the record, such as the trial court ruling, to determine if the judgment rests on independent and adequate state grounds. See *First National Bank v. Anderson*, 269 U.S. 341, 346 (1926); *Staub v. Baxley*, 355 U.S. 313, 318 (1958). Occasionally, this Court may examine state law and state precedents, particularly to determine the adequacy of the state ground. *Texas v. Brown*, 460 U.S. 730, 732 n.1 (1983) (plurality opinion); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). On all three scores, it is beyond cavil that an independent and adequate state ground supports the appellate opinion in this case.

To begin with, the appellate court explained that its affirmance of the trial court's order creating an exclusion from the "speech free zone" served two interests:

> the property rights of the clinic and the privacy rights of clinic patients. Regarding the latter,

> *"[a]rticle I, section 1 of the California Constitution expressly makes the pursuit and obtaining of privacy an 'inalienable right.' The state right of privacy protects information about a citizen's participation in a medical procedure including abortion."* (Citation omitted.) (Italics added.) (Pet. at 20a.)

Further, the trial court's order granting a permanent injunction against petitioners' harassment and interference with patients seeking medical advice about abortion from respondent clinic states, in relevant part:

> Because a woman's decision to terminate her pregnancy is one of the most private decisions imaginable and because it is protected by *both the United States and California Constitutions, (Roe v. Wade* [citation] (holding that the right of privacy, as guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy); *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 241-42, and cases cited therein), the State has a compelling interest to ensure that a woman has the ability to effectuate her decision within the limits specified in *Roe*, and to do so with the least harassment possible. (Italics added.) (Pet. at 84a.)

Finally, the specific pages referred to by the trial court in its citation to *Chico Feminist Women's Health Center v. Scully, supra,* 208 Cal.App.3d at 241-42 make clear that the basis for the appellate opinion's affirmance of the order is an "independent" and "adequate" state ground:

> It is unclear whether the federal right protects citizens from invasions of their privacy by private citizens or whether the federal right guards only against state action. [Citations.] *However,*

> *our state privacy guaranty is broader than the federal privacy right* (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 263.) *Article I, section 1 of the California Constitution expressly makes the pursuit and obtaining of privacy an "inalienable right." The state right of privacy protects information about a citizen's participation in a medical procedure, including abortion.* (See *People v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 255, 241; *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 276-278; see also *Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 901; *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1147; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 679.) *And it has been held the state privacy right protects against invasions of privacy by private citizens as well as the state.* (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829, followed in *Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, 98 [citing other authorities following *Porten*].) (Italics added.) *Id.*

Thus a review of the appellate and trial court orders herein and the numerous state authorities upon which they rely make clear that the bases for these decisions was the "independent" and "adequate" state ground of article I, § 1 of the California Constitution: the right of privacy which is broader than its federal counterpart.

B. The Application of Cal. Code of Civ. Proc. § 1021.5 to Award Attorney Fees to Respondent Was Proper and Did Not Chill Freedom of Expression Because, in Enforcing the Right of Patients to be Free of Harassment and Intimidation from Petitioners when they Sought Medical Advice about Abortion, it Conferred a Significant Benefit Upon the General Public.

Petitioners' cry that imposition of attorney fees, sanctioned herein by a state statute that parallels the federal Civil Rights Attorneys Fee Act, will chill their constitutional rights to free expression is best answered by what others have aptly said before to those like them: they "doth protest too much, methinks."[1] This, in fact, is nothing more than a veiled attempt by petitioners to escape recognition that it was respondent, not they, who prevailed herein; it is respondent, therefore, who is entitled to an award of attorney fees. *Board of Supervisors v. Sacramento Local Agency Formation Com.*, 6 Cal.App.4th 475, 520 (1991) ("A party may be considered prevailing if it is successful on any significant issue which achieves the party's aim."). It is, after all, the rights of respondents' thousands of patients that were protected by the injunction. Petitioners stubbornly refuse to accept the well-established distinction between speech and conduct, or acknowledge that the only constitutional rights infringed herein were those of respondent's patients to be let alone from petitioners' meddlesome behavior.

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[1] Shakespeare, *Hamlet*, act III, scene ii, line 242.

This is precisely the kind of case in which attorney fees are appropriate. As stated in *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 477 (3rd Cir. 1989) where an attorney fee award was upheld under RICO by analogy to the federal Civil Rights Attorney Fee Award Act (42 USC § 1983 et. seq.):[2]

> While defendants may have strong convictions against the wisdom or morality of women making a voluntary decision to obtain an abortion, under our Constitution and laws there is in this country no superior, dominant ruling class of citizens who may escape the consequences of their violent and lawless behavior. Neither those who believe strongly in the "right to life" nor those who believe fervently in "freedom of choice" have any special immunity from the operation of the rule of law in our society.

Finally, petitioners never sought an apportionment of fees at trial pursuant to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), nor did they raise the issue on appeal until their reply brief, and then did not show good cause for failure to present the argument before. (Pet. at 32a-34a.) Only when the dissent by Justice Puglia raised it did they take up the clarion call for apportionment, this

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[2] The analogy between the federal attorney fee statute and our state statute is apt. *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal.3d 917, 934 (1979) recognized that "in framing the provisions of section 1021.5 the Legislature drew heavily upon the pre-*Alyeska* opinion (i.e., *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975))," and that, accordingly, "such authorities . . . will often be helpful and reliable guides in interpreting the various provisions of the California statutes." See also on this same point, *Miller v. California Comm. on Status of Women*, 172 Cal.App.3d 837 (1985).

time adding the wrinkle that it should not be based only on respondent's relative success with the litigation, but on the relative culpability of each petitioner. As to comparative litigation success, respondent "got virtually all it asked for." (*Id.* at 34a.) Apportionment would not alter the fee using the litigation success criterion. And as for culpability, the record reflects that the petitioners did not act as isolated individuals in interfering with the rights of the FWHC patients: they acted in concert as ring leaders of the anti-abortion crowds engaged in the unlawful behavior. The only logical and fair way to impose attorney fees on those engaged in inciting and leading lawless behavior is by the rule of joint and several liability.

Finally, unlike *NAACP v. Claiborne Hardware Co., supra,* 458 U.S. 886, respondent commenced this action to enjoin petitioners unlawful and unprotected conduct. In contrast to *Claiborne,* as the appellate opinion herein stated, the FWHC "was compelled to retain counsel to secure an order enjoining *unprotected conduct engaged in by all of the [petitioners],* [hence] it is proper to hold all of them accountable for plaintiff's attorney fees." (Pet. at 30a.)

II. THE APPELLATE OPINION'S NARROWLY DRAWN ORDER CREATING A "SPEECH FREE ZONE" FOR PETITIONERS PROPERLY BALANCED THE RIGHTS OF RESPONDENT AND ITS PATIENTS TO MEDICAL PRIVACY WITH THE RIGHTS OF ANTI-ABORTION PROTESTORS, AND IS CONSISTENT WITH THIS COURT'S OPINIONS.

It is unclear whether petitioners even acknowledge that the federal and California constitutional guarantees

to freedom of expression,[3] which extend to private individuals on the exterior sidewalks and parking lots and in the public access areas of privately owned commercial centers, are subject to *reasonable time, place and manner restrictions*. (Pet. at 16-17.) They do recognize the plethora of opinions underscoring the hornbook law notion that freedom to speak is not absolute, but must bow to specific, narrowly drawn, and reasonable regulation, especially when, as here, the constitutional rights of others are in danger of being infringed by expression brigaded with harassing conduct. See, *e.g., Schwartz-Torrance Investment Corporation v. Bakery and Confectionery Workers' Union*, 61 Cal.2d 766 (1964); *In Re Hoffman*, 67 Cal.2d 846 (1967); and *In Re Lane*, 71 Cal.2d 872 (1969).[4]

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[3] Cal. Const., art. I, § 2(a): "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[4] It is well settled that the government may impose reasonable time, place, and manner restrictions on all expression. See *e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). These restrictions are permissible if they " 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *Frisby v. Schultz*, 487 U.S. 474 (1989) (quoting *Perry Educ. Assoc. v. Perry Legal Educ. Assoc.*, 460 U.S. 37, 45 (1983)). "Time, place, and manner" restrictions have most recently found expression in *Barnes v. Glen Theatre, Inc.*, 115 L. Ed. 2d 504, 59 U.S.L.W. 4745, 111 S. Ct. 2456 (1991) (upholding Indiana's statutory restriction on nude dancing). See also *Hague v. Committee For Indus. Org.*, 307 U.S. 496, 515-16 (1939) (the "privilege of a citizen of the United States to use the streets and parks for communication of views on a national question . . . is not absolute . . . ."); *Heffron v. International Soc'y For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (the First Amendment "does

But petitioners do not feel the state courts' regulation of their conduct by injunction is reasonable. They contend that the restrictions on their access to the private parking lot, to the building in which the clinic has its offices, to the front door of the building, and to the patients who ask to be accompanied by escorts so as to avoid petitioners, are so unreasonable as to be unconstitutional. In support of their argument they cite numerous cases and cull therefrom general quotes about the primacy of freedom of expression without adequate explanation of the factual context from which the quotes derive or how they apply to the conduct at issue herein. The cases and quotes upon which petitioners base their free-speech objections to the instant injunction define the contours of the right to free speech for the population at large; by contrast, petitioners fall into the special category of persons who have been found to have engaged in illegal and intimidating conduct. In such cases, injunctions similar to the one imposed in this case have regularly been upheld. See *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988).

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not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."); and *Scully, supra*, 208 Cal.App.3d at 244 quoting *Perry Educ. Assn., supra*, 460 U.S. at 45.

A. The Court's Restriction against Petitioners' Entering Respondent Clinic, Blocking the Doors to the Clinic, and Blocking the Entrance to the Parking Lot or Coming on the Parking Lot to Harass Clinic Patients and Others Exiting and Entering their Cars is Reasonable and Constitutional.

The factual similarities between *Allred v. Shawley*, 232 Cal.App.3d 1489 (1991), *Planned Parenthood of San Diego v. Wilson*, 234 Cal.App.3d 1662 (1991) – both of which petitioners dismissed as "wrongly decided" in their state court briefing – and this case are striking. The abortion clinics in *Allred* and *Planned Parenthood of San Diego* are maintained in buildings with six and ten total tenants, respectively. Each tenant in the two buildings offers professional and personal services to specific clientele, and the buildings are for use only by individuals with specific business purposes, such as employees, clients and prospective clients of the tenants. See *Planned Parenthood of San Diego, supra* at 1672-73 and *Allred, supra*, at 1494. Appointments are usually required to see all tenants of the buildings and walk-ins are an infrequent occurrence. The private adjoining parking lots of these two buildings are also designated with "No Parking" and "Private Parking" signs. These features of the two buildings are shared by FWHC and other tenants of the medical building and, as such, separate these clinics from traditional public forums.

Petitioners also cite repeatedly to *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979) and *Schwartz-Torrance Investment Corporation, supra*, 61 Cal.2d 766 for the

proposition that members of the public cannot be selectively excluded from private commercial centers open to the public for business purposes. Unlike this case, however, both opinions involved large shopping centers which the court found to be "the functional equivalent for the suburban counterpart of the traditional town center business block, where historically the public's First Amendment activity was exercised and its right to do so scrupulously guarded." *Planned Parenthood of San Diego, supra,* 234 Cal.App.3d at 1670 citing *Robins.* It requires little imagination to distinguish a small private medical clinic from a large retail shopping center. As *Robins* held, the California Constitution independently protects speech and petition rights reasonably exercised in privately owned shopping centers, but this does not "imply that those who wish to disseminate ideas have free rein," nor does its scope include "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." *Robins, supra,* 23 Cal.3d at 910.

The underlying rationale of *Robins* is common-sense: "[T]he smaller the business, the more weight the owners' rights will have." *Allred, supra,* 232 Cal.App.3d at 1496. *Allred* discussed special circumstances that arise where the ideas or information are effectively dispensed only in a specified location. "In this instance, the issues are the degree to which the business has been opened to the public, the amount of disruption of the owners' business which the activity will cause, and the availability of alternative forums." *Id.*

In *Planned Parenthood of San Diego,* the court found the medical center in question, which housed six tenants and has an adjoining parking lot, to resemble a "modest

retail establishment" providing professional and personal services to specific clientele. "Although members of the public are invited to avail themselves of the particular services performed by specific tenants providing medical services, they are not invited to congregate, relax, visit, seek out entertainment, browse and shop for personal, household or general business merchandise." *Planned Parenthood, supra,* 234 Cal.App.3d at 1672. The court relied upon *Brown v. Davis,* 203 N.J. Super. 41 (1984), 495 A.2d 900 *aff'd State v. Brown,* 212 N.J. Super. 61, 513 A.2d 974 (1986) for persuasive analysis. In *Brown,* an anti-abortion group sought to enjoin a prosecution for criminal trespass for entering the parking lot of a medical center to place anti-abortion literature on a parked car. In that center, one very similar to FWHC, the tenants offered services to the general public other than retail sales. The trial court concluded the owner had not sufficiently dedicated the property to public use so as to entitle individuals to access for speech activity. The *Brown* court reasoned:

> The Center is normally used by employees of tenants and prospective customers visiting specific businesses for the limited services made available to them. It is not a place to which a general consumer would go to shop for personal, household or general business merchandise. *Id.* at 903.

On appeal, the reviewing court rejected the argument that anti-abortionists had a right to free speech activity on the center's property, declaring the private property bore no resemblance to a public forum and the center's invitation was clearly designed for private and personal purposes. *Brown, supra,* 513 A.2d at 977. See also *Adderly v. Florida,*

348 U.S. 39, 48 (1966) ("The guarantees of the First Amendment have never meant that people who want to [protest] have a constitutional right to do so whenever and however and wherever they please . . . The right to exclude others is a fundamental element of private property ownership, and the first amendment does not create an absolute right to trespass."). *Accord, Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1978); *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976). Similarly, restrictions on speech that causes emotional turmoil to medical patients, jeopardizing their safety and impairing their recovery, are also permitted by the First Amendment. *NLRB v. Baptist Hospital*, 442 U.S. 773, 784-86 (1979).

In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), police arrested a union organizer for trespassing on the privately owned parking lot of a retail hardware store. The Court stated that the owner of the private property could not be subjected to the commands of the First and Fourteenth Amendments until the private property "assume[d] to some significant degree the functional attributes of public property devoted to public use." *Id.* at 547. The union argued, as do petitioners herein, that the parking lot was open to the public and, as such, had acquired the attributes of a public municipal facility. The Court rejected this contention, stating that such a position would "constitute an unwarranted infringement of long-settled rights of private property protected by the [constitution.]" *Id.*

The medical building here is practically identical to the center in both *Planned Parenthood of San Diego* and *Brown*. In no way did the medical building or FWHC hold

itself out to be a public forum. There is sufficient evidence to support the trial court's determination that the building maintained the character of its property as private, thus precluding a determination the public was free to use the private parking lot as a forum to reach patients of the clinic. (JA 1551, RT 134-137).

Noninterfering or nondisruptive conduct has been defined as: "[T]that which does not interfere with the conduct of business or the use of the property, does not impede movement of customers or business tenants, does not block access to facilities or businesses, is not noisy and creates no disturbance and does not entail the harassment of uninterested patrons." *In Re Hoffman, supra,* 67 Cal.2d 846, 851, quoted in *Allred, supra,* 232 Cal.App.3d at 1502. In applying this definition to the facts of its case, *Allred* found that interference with the abortion clinic's business was an avowed purpose of the protesters. The following passage which describes petitioners' conduct in *Allred* is instructive for this case:

> Face to face (if not face *in* face) encounters were the rule. Petitioners here were approaching Allred's patients while still in their cars in the parking lot, then following them to the door of the building. There is evidence that the petitioners interfered with the patients' access to the building, emotionally upset several patients, and caused such confusion in the parking lot that at least one other tenant has vacated the premises for this reason . . . [The clinic] was forced to hire escorts to ensure unimpeded passage for its patients from their cars to the clinic door. *Id.* at 1503.

Without the permanent injunction, FWHC's business, as with the case of the clinics in *Allred* and *Planned Parenthood of San Diego*, would be substantially disrupted, resulting in serious injury to its patients.

B. The Court Order was Content Neutral and Ensured that Petitioners had Ample Alternative Channels of Communications in Which to Express their Anti-Abortion Views.

The speech free zone created by the injunction and challenged herein by petitioners enabled them to win the attention of their intended audience without infringing upon the rights of respondent and its patients. That, of course, was why the court created the speech free zone. If any one in petitioners' intended audience – the patients coming to FWHC for abortion advice and abortions – is willing to receive literature or information from petitioners, all she has to do is walk twenty feet to the outskirts of the speech free zone. Contrary to petitioners' claim, the speech free zone does not deny freedom of expression to petitioners, but makes it possible by protecting the intended target from harassment while still allowing petitioners to express themselves.

In *Bering v. Share*, 721 P.2d 918 (1986), cert. dism. *sub nom. Share v. Bering*, 479 U.S. 1050 (1987), the Washington Supreme Court, in recognizing the need for ample alternative means of communication, granted an injunction prohibiting anti-abortion picketing directly in front of a medical clinic, but permitting picketing away from the

clinic entrance in view of those clients entering the building. The picketers therefore had a ready means of reaching their chosen audience. Concerning whether the injunction in *Bering* was content-neutral or content based,[5] the court stated:

> Although only anti-abortion picketers are bound by geographic restrictions . . . that in itself cannot be viewed as content regulation. The trial court imposed the place restriction in order to regulate the conduct of a particular group of persons before the court. A similar restriction which enjoined all picketers regardless of their conduct would have been overly broad. *Id.* at 925.

Similarly, in *Portland Fem. Women's H. Center v. Advocates For Life, supra,* 859 F.2d 681, an injunction removed anti-abortion picketers from 25 feet of sidewalk immediately in front of a clinic's doors. However, as was done in this case, the picketers were free to use the area to either side of that strip in view of persons entering the

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[5] The lower court, per Judge James T. Ford, emphasized the content-neutral character of the preliminary injunction:

> "And the sole [purpose] of that injunction . . . was purely to make sure [that] there was an opportunity for ingress and egress. [¶] I allowed you to use whatever speech you want to say. The only thing I didn't want you to do was to preclude or threaten patients who [are] attempting to enter the premises, and we do that in all kinds of cases, we do it in all kinds of labor disputes; it's common, we do fix the row of picketing and so forth . . . [¶] I certainly hope you don't read the injunction in any other manner except to protect and preserve the rights of this business to operate lawfully as it is doing." (RT 107-108).

clinic. *Id.* at 684-686. The court's explicit reason for creating this speech-free zone aptly applies to the facts of this case: "The free zone is tailored to address threats, intimidation, and assault of clinic personnel and clients that impede the safe provision of medical care." See also *Chico Feminist Women's Health Center v. Scully, supra,* 208 Cal.App.3d 230.

Neither does the prohibition on petitioners entering the private parking lot constitute an abridgment of their freedom of expression. As *Allred* found, in language that applies with equal validity to this case, alternative forums also existed after petitioners were enjoined from demonstrating in the parking lot.

> [T]here was sufficient opportunity to reach the targeted audience. The public sidewalk along the front of the building was but 32 feet from the lobby of the building. And that lobby was entirely unshaded glass, from which patients could easily see placards and billboards . . . If the patients are interested in further information, or person to person contact, they have only to stop at the sidewalk. Appellants are not denied access to their quarry. *Allred, supra,* 232 Cal.App.3d 1503.

Planned Parenthood of San Diego also affirmed that "the protesters' exclusion from the parking lot [did] not deprive them of an ample opportunity within the traditional public forum of the public sidewalk to reach [willing listeners]." *Planned Parenthood, supra,* 234 Cal.App.3d at 1674. This holding was precipitated by the court's finding that, despite the injunction barring appellants from the parking lot, patients "can simply accept the protesters' literature by rolling down their car windows,

slow or stop on the street as they enter the driveway or, after parking the car, return to the sidewalk for discussion." *Id.* This remains the case at the clinic building herein; thus, the injunction does not deny a reasonable alternative channel of communication for the protesters to directly communicate their message to their targeted audience, and does not violate the First Amendment guarantee to freedom of speech.

CONCLUSION

For all the aforementioned reasons, the petition for certiorari should be denied.

Respectfully submitted,

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